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COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, RSC 1985, c C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR
ARRANGEMENT OF 2324159 ALBERTA INC.



DOCUMENT

BENCH BRIEF

ADDRESS FOR SERVICE AND
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BENCH BRIEF OF TD EQUIPMENT FINANCE CANADA

**IN RESPECT OF THE MONITOR'S APPLICATION SEEKING APPROVAL OF A COST
ALLOCATION METHODOLOGY, THE MONITOR'S ACTIONS, A DISTRIBUTION, AND AN
EXTENSION OF THE STAY PERIOD**

TO BE HEARD BY THE HONOURABLE JUSTICE K.M. EIDSVIK

September 2, 2021 at 10:00 a.m.

I. INTRODUCTION

1. This bench brief of TD Equipment Finance (“**TDEF**”) is in response to the application by FTI Consulting Canada Inc., in its capacity as the court-appointed monitor (the “**Monitor**”) of 2324159 Alberta Inc., seeking, *inter alia*, the approval and implementation of the proposed cost allocation methodology (the “**Proposed Cost Allocation**”), as set out in paragraphs 22 – 26 and Appendix “B” of the Eighteenth Report of the Monitor, dated August 16, 2021.
2. TDEF disputes that it should have to pay any portion of the allocated costs pursuant the Proposed Cost Allocation as it is not a secured creditor, but rather a “true” lessor of equipment.

II. FACTS

3. TDEF is a finance company carrying on business nationwide, including in the province of Alberta.
4. On March 15, 2017, JMB Crushing Systems ULC (“**JMB**”) entered into Master Equipment Lease No. 25904 with TDEF (the “**Lease**”).¹
5. Pursuant to the Lease, TDEF agreed to lease to JMB equipment described as:
 - a. (1) 2014 AMI Thunderbird II 3054JVE Electric Portable Jaw Plant w/Switchgear Serial No. 2807-14
 - b. (1) 2014 CR 30X54 Jaw Crusher Serial No. TRXJ3054COKEE0657
 - c. (1) 2014 AMI 50X20 C04521 VGF Serial No. 2806-14
 - d. (1) 2015 Terex/Cedarapids 6203 Portable Screening Plant Serial No. TRX620HSCOKFK0807
 - e. (7) 2015 36X50 Superior Stackable Conveyors with Legs Serial Nos. 817775, 847651, 847652, 847655, 847656, 847657, 847658
(collectively, the “**Equipment**”).

¹ See the Affidavit of Alane MacDonald sworn August 31, 2021 (the “**MacDonald Affidavit**”) and Exhibit “A” thereto.

6. The Lease contained, *inter alia*, the following term:

25. RETURN OF EQUIPMENT UPON TERMINATION. Upon the expiration or other termination of this Lease or a Schedule, Lessee shall at Lessee's expense deliver the related Equipment to Lessor...
7. On or around May 1, 2020, JMB Crushing Systems Inc. and 2161889 Alberta Ltd. initiated proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA Proceedings**").
8. TDEF received approval to remove its assets on June 2, 2020 as TDEF was advised that the TDEF assets were not being used and would not be included in going concern bids that were then being contemplated.
9. Following the commencement of the CCAA Proceedings, and approval of removal as referenced above, TDEF repossessed the Equipment pursuant to the Lease.
10. On or around April 21, 2021, TDEF was provided a Notice by Debtor Company to Disclaim or Resiliate an Agreement form in relation to the Lease (the "**Disclaimer Form**").²
11. TDEF has received no payments in accordance with the Lease following the commencement of the CCAA Proceedings despite TDEF being entitled to payment, despite TDEF demanding payment from JMB and the Monitor, and despite the other creditors receiving payment during the CCAA Proceedings.
12. Pursuant to the Proposed Cost Allocation, the Monitor is seeking contribution for the CCAA Proceedings costs from TDEF.

III. ISSUE

13. The issues to be determined by this Honourable Court is:

² See the MacDonald Affidavit and Exhibit "B" thereto.

- a. Is the Lease a “true lease”?
- b. If so, should TDEF have to contribute to the CCAA Proceedings costs as per the Proposed Cost Allocation?

IV. LAW

a. Is the Lease a “True Lease”?

14. The principles that apply in ascertaining the nature of a lease are summarized as follows in *Connacher Oil and Gas Limited (Re)*, 2017 ABQB 769 at para 15:

- For a court to determine whether it is dealing with a true lease or a financing lease, it must look to the substance of the arrangement between the parties rather than the form of the arrangement.
- The court must examine a number of factors, some of which are contained in the document itself, some of which relate to the manner in which the parties effected their arrangement, and some of which deal with the nature of the parties themselves.
- No one factor is determinative, although some might be more indicative of the nature of the lease.
- The objective of a court’s analysis is to determine the parties’ intent at the time they entered into their arrangement, and the document itself may help in that determination.
- Courts must show particular deference to the wording of the document where the parties are sophisticated commercial parties.
- A court must interpret an agreement as at the date it was made, as the exercise is intended to discern the intention of the parties at the time the contract was formed.

15. With these principles in mind, courts often have considered the non-exhaustive 16 factor test set out in *Smith Brothers Contracting Ltd (Re)* (1998), 1998 CanLII 3844 (BC SC), 53 BCLR (3d) 264 at para 67 to evaluate the nature of a particular lease as follows:

1. Whether there was an option to purchase for a nominal sum;
2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;
3. Whether the nature of the lessor's business was to act as a financing agency;
4. Whether the lessee paid a sales tax incident to acquisition of the equipment;
5. Whether the lessee paid all other taxes incident to ownership of the equipment;

6. Whether the lessee was responsible for comprehensive insurance on the equipment;
7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;
8. Whether the agreement placed the entire risk of loss upon the lessee;
9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;
10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;
11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;
12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement (this would not apply in Canada);
13. Whether there was a default provision in the lease inordinately favourable to the lessor;
14. Whether there was a provision in the lease for liquidated damages;
15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;
16. Whether the aggregate rental approximated the value of purchase price of the equipment.

16. As stated in *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2012 ABQB 59 at para 65:

While the presence or absence of one or more factors may loom larger than others, in all instances the inquiry remains focused on determining the intention of the parties and is based on an interpretation of the entire agreement. As stated by the Alberta Court of Appeal in *De Lage Landen (CA)*, one factor cannot trump others in terms of the legal test. Courts must review the entire agreement and they must consider all factors. That is not to say, however, that certain factors may not have greater probative value than others in terms of the particular agreement before the court. In such a case, the court might give those factors greater weight. In all cases, the court must examine the various *Smith Brothers* factors and any other factors it considers material and relevant, balance those factors in the context of the entire agreement, and make a determination as to whether the agreement before it as a financing lease or a true lease. This is not a scientific exercise.

17. TDEF's application of the above *Smith Brothers* factors in relation to the Lease is as follows:

1. Whether there was an option to purchase for a nominal sum;
 - No, at the expiry of the Lease purchase could occur at Fair Market Value.

2. Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;
 - No.
3. Whether the nature of the lessor's business was to act as a financing agency;
 - TDEF provides leases
4. Whether the lessee paid a sales tax incident to acquisition of the equipment;
 - No.
5. Whether the lessee paid all other taxes incident to ownership of the equipment;
 - Yes.
6. Whether the lessee was responsible for comprehensive insurance on the equipment;
 - Yes.
7. Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;
 - Yes.
8. Whether the agreement placed the entire risk of loss upon the lessee;
 - No. The insurable risk of loss was entirely borne by the lessee. The Court in *Connacher*, however, held at paras 23-26 that, rather than the insurable risk of loss, this factor means the loss at the end of the term of the lease or other earlier termination. Under that interpretation, the entire risk was *not* borne by the lessee in the event of early termination.
9. Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;
 - No.
10. Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;
 - Yes.
11. Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;
 - No.
12. Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement (this would not apply in Canada);
 - The U.C.C. is not applicable however the Lease does permit the registration of a financing statement
13. Whether there was a default provision in the lease inordinately favourable to the lessor;
 - No.
14. Whether there was a provision in the lease for liquidated damages;
 - Yes.

15. Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;
 - Yes.
16. Whether the aggregate rental approximated the value of purchase price of the equipment.
 - Was around the same value.

18. TDEF submits that similar to the finding in *Connacher Oil and Gas Limited (Re)*, 2017 ABQB 769 at paragraph 29, while there are certain aspects of the Lease that point to a financing arrangement, when this Court looks at the transaction as a whole, it should find that the Lease is a true lease.
19. Further, TDEF respectfully submits JMB Crushing Systems Inc., with the approval of the Monitor, providing the Disclaimer Form is evidence of their recognition that the Lease was a “true” lease, as same would not be required if the Lease was a financing agreement: see CCAA s. 32(9)(c).

b. Should TDEF have to contribute to the CCAA Proceedings?

20. Case law has shown that “true” lessors will not be obliged to bear any portion of CCAA costs because it received no benefit from the CCAA proceedings: see *Respec Oilfield Services Ltd. (Re)*, 2010 ABQB 277 (“*Respec*”) and *Western Express Air Lines Inc. (Re)* [2005] B.C.J. No. 72.
21. In *Respec* specifically, Justice Bielby found that the “true” lessor of equipment that opted to remove its equipment from the CCAA sales process is exempted from paying any portion of the administrative costs under the CCAA proceedings.
22. This conclusion was found in *Respec* despite the lessor receiving payments during the CCAA stay, as required pursuant to section 11.01(a) of the CCAA, where in contrast TDEF has received no payments following the commencement of the CCAA Proceedings.
23. TDEF received no benefit from the efforts to reorganize in the CCAA Proceedings, and less than which accrued to the lessors in *Western Express Air Lines Inc. (Re)* and *Respec*, and just as Chief

Justice Brenner and Justice Bielby found no basis under the general equitable principles of the CCAA for requiring the lessors to contribute to the allocated costs, that must also be the result on this more egregious set of facts.

24. It is therefore respectfully submitted that as TDEF received no benefit from the CCAA Proceedings, it thus should not be obliged to contribute to the allocated costs.

V. RELIEF REQUESTED

25. TDEF respectfully requests that this Honourable Court not approve the Proposed Cost Allocation with respect to TDEF, and order that it should not be obliged to contribute to the CCAA Proceedings allocated costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of August



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